90-1737

No. _____

Supreme Court, U.S.
FILED
MAY 8 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

FULTON COUNTY, GEORGIA,
Cross-Petitioner,
v.
S.J. GROVES & SONS COMPANY AND
JASPER CONSTRUCTION COMPANY,
Cross-Respondents.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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May 1991

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QUESTIONS PRESENTED

1. Whether a local or state government recipient of federal funds under a federal grant may be liable in monetary damages to a private party for its good faith reliance upon and compliance with presumptively valid federal regulations that are authorized by Congress, if those regulations are subsequently held invalid?

2. Whether *American Trucking Associations v. Smith*, 495 U.S. ____, 110 L.Ed.2d 148 (1990), holds that a local or state government recipient of federal funds under a federal grant could be liable in monetary damages to a private party for its good faith reliance upon and compliance with presumptively valid federal regulations authorized by Congress, if those regulations are subsequently held invalid?

LIST OF INTERESTED PARTIES

The following were parties to the proceedings in the Eleventh Circuit Court of Appeals: S.J. Groves & Sons Company, Jasper Construction Company[1] (Petitioners/Cross-Respondents) (hereinafter "Groves"), and Fulton County, Georgia (Respondent/Cross-Petitioner) (hereinafter "Fulco").

The United States Department of Transportation was a party to the proceedings in the District Court and an appellant in the Court of Appeals. On September 18, 1989, the Eleventh Circuit dismissed the United States Department of Transportation pursuant to its motion for voluntary dismissal.

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[1] Jasper Construction Company is a wholly owned subsidiary of S.J. Groves & Sons Company.

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CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

OPINIONS BELOW

The Court of Appeals' opinion sought to be reviewed is reported at 920 F.2d 752 (11th Cir. 1991) and is reproduced in the Appendix to the Petition for Writ of Certiorari filed by Groves on April 6, 1991 at 1a (petition pending, Case No. 90-1562). The District Court's opinion is reported at 696 F. Supp. 1480 (N.D. Ga. 1987) and is reproduced in the Appendix filed by Groves at 1b. The District Court's other orders are unpublished but are reproduced in Groves' Appendix at 1c, 1d, and 1e.

JURISDICTIONAL STATEMENT

The opinion and judgment of the Eleventh Circuit Court of Appeals were entered on January 7, 1991. This Cross-Petition has been timely filed in accordance with Rules 12.3 and 13 of the Rules of this Court. Fulco received a copy of Groves' Petition for a Writ of Certiorari on April 8, 1991. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Section 30 of the Airport and Airway Development Act of 1970, as amended by the Airport and Airways Development Act Amendments of 1976, 49 U.S.C. § 1730, as amended by the Airport and Airways Improvement Act of 1982, 49 U.S.C. § 2219:

> The Secretary shall take affirmative action to assure that no person shall, on the grounds of race, creed, color, national origin, or sex, be excluded from participating in any activity conducted with funds received from any grant made under this chapter. The Secretary shall promulgate such rules as the Secretary deems necessary to carry out the purposes of this section and may enforce this section, and any rules promulgated under this section, through agency and department provisions and rules which shall be similar to those established and in effect under title VI of the Civil Rights Act of 1964. The provisions of this section shall be considered to be in addition to and not in lieu of the provisions of title VI of the Civil Rights Act of 1964.

49 Code of Federal Regulations, Part 23 (45 Fed. Reg. 21172 et seq., March 31, 1980, as amended at 46 Fed. Reg. 23457 et seq., April 27, 1981, and as amended at 46 Fed. Reg. 60458 et seq., December 10, 1981) entitled "Participation by Minority Business Enterprises in Department of Transportation Programs":

> 49 C.F.R. § 23.01-23.55 is reprinted in Groves' Appendix at 1f.

42 U.S.C. § 2000(d) (Title VI):

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

O.C.G.A. § 36-10-2:

> Whenever it becomes necessary to build or repair any courthouse, jail, bridge, causeway, or other public works in any county, the county governing authority shall cause the same to be built or repaired by letting out the contract therefor to the lowest bidder, at public outcry, before the courthouse door, after having advertised the letting of the contracts, as provided in Code Section 36-10-3, provided that such county authorities shall have authority to reject any and all bids at the public letting. If, in their discretion, the public interest and economy require it, the county authorities may build or repair any public buildings, bridges, causeways, or other public property in the county by contract or sealed proposals, to be invited under the same provisions as to specifications and like information as are provided in Code Sections 36-10-3 and 36-10-4.

STATEMENT OF THE CASE

This case arises out of a resurfacing project at the Fulton County, Georgia Airport. The Fulco Airport is designated as a "reliever airport" by the United States Federal Aviation Administration ("FAA"). The function of a reliever airport is to provide facilities to divert as much general aviation traffic from air carrier airports such as Hartsfield International Airport as is possible in the interest of safety to the traveling public using such fields. Because Fulco's Airport is a designated "reliever airport", it is eligible for federal assistance under Section 30 of the Airport and Airway Development Act of 1970, as amended by the Airport and Airways Development Act Amendments of 1976, 49 U.S.C. § 1730, as amended by the Airport and Airways Improvement Act of 1982, 49 U.S.C. § 2219 ("AADA").[2]

The FAA determined that the instrumented runway at the Airport was in a rapidly deteriorating condition and would soon become hazardous and unusable and have to be closed if it was not repaired immediately. Closing the instrumented runway would have resulted in immediately closing the Airport. The DOT/FAA also determined that the runway repair project "be furnished a high-priority status to federal funds."

Because Fulco did not have sufficient funds at that time to repair the runway, Fulco in order to keep the Air-

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[2] One of the purposes of the AADA as amended in 1976 and in 1982 was to make funds available for improvements to reliever airports because of the critical purpose they serve in connection with aviation traffic and safety to the travelling public. 1982 U.S. Code Cong. & Ad. News 1156, 1159, 1161, 1163, 1165, 1175; 1976 U.S. Code Cong. & Ad. News 1600, 1602-04, 1608, 1611, 1637, 1638, 1639, 1640, 1644. According to the legislative history of the AADA, "reliever airports" serve a vital role *nationwide*, and it is a *federal* policy to maintain the operation of and improve reliever airports. *Id.*

port in operation had no alternative except to apply for a grant from the United States Department of Transportation ("DOT") pursuant to the AADA. The record shows that Fulco had to receive financial assistance from the United States to accomplish the Airport Project, especially based on the immediate need for the work. There is no evidence that Fulco had any alternative available to it based on the circumstances at that time.

As an express condition to approval of the Federal Grant Agreement from the FAA and the DOT, Fulco was required to comply with the provisions of the AADA and the regulations promulgated by the DOT, including the provisions of 49 Code of Federal Regulations, Part 23 (45 Fed. Reg. 21172 *et. seq.*, March 31, 1980, as amended at 46 Fed. Reg. 23457 *et seq.*, April 27, 1981, and as amended at 46 Fed. Reg. 60458 *et seq.*, December 10, 1981) entitled "Participation by Minority Business Enterprises in Department of Transportation Programs" (hereinafter "49 C.F.R. Part 23"). The DOT Regulations and Federal Grant required Fulco to prepare and submit for approval by the FAA a Minority Business Enterprise ("MBE") program solely for the Airport Project. In compliance with the DOT Regulations and Federal Grant, Fulco prepared a five-year MBE program for the Airport Project in 1982 ("the 1982 Program").

The DOT Regulations and Federal Grant provide that meeting the MBE participation goals or making a good faith effort to meet the goals is a condition of Fulco's receiving the DOT assisted contract. *The District Court found and there is no dispute that the Fulco 1982 MBE Program was developed solely to comply with Section 30 of the AADA, the DOT Regulations, and as an express condition of the Grant Agreement.* Fulco is contractually bound to the commitments made in the MBE program as approved the DOT. The Grant Agreement provides that Fulco's adoption of the MBE Program is a "legal obligation," which if Fulco failed to adopt would subject it to

sanctions, including termination of the agreement or other measures which may affect Fulco's ability to obtain future DOT financial assistance. [Fulco's Appendix at 40a-41a].

The DOT/FAA reviewed the Fulco MBE Program and determined its compliance with 49 C.F.R. Part 23 (in effect in April, 1982), including the minority and female percentage goals. The FAA officially approved Fulco's MBE Program on or about April 20, 1982. In approving this Program, the FAA determined the MBE participation percentage goals to be reasonable, practical, attainable, and in compliance with 49 C.F.R. Part 23.45.

The bid which Groves submitted on the Airport Project (approximately $820,000) was the lowest dollar bid received by Fulco. The MBE participation percentage given by Groves was only 4.15%, a number which was not documented as required by the Bid Specifications. The second lowest bid received (approximately $22,000 higher) contained an MBE participation level of 10%. The third lowest bid contained an MBE participation level of 22%.

Fulco conditionally awarded the contract for the Airport Project to Groves provided that it make a good faith effort to increase its MBE participation pursuant to the federal regulations. Approximately one month later Groves had not increased its 4.15% MBE participation figure. At its next regularly scheduled Board Meeting, Fulco determined that Groves had not used good faith efforts during that month to increase its MBE participation, and voted that Groves had not satisfied the condition for award of the contract to it.

Thereafter, Fulco conditionally awarded the contract to the second lowest bidder which had an MBE participation level of 10% in its original bid. As with Groves, the award was conditioned upon that bidder's good faith efforts to increase its MBE participation. Two days following the conditional award of the contract, that bidder in-

creased its MBE participation from 10% to 16%. Fulco determined that a 6% increase in two days constituted a good faith effort on the part of the second lowest bidder, and although it did not achieve the 20% MBE goal, Fulco awarded the contract to the second lowest bidder with the approval of the FAA.

Although Groves received the Invitation To Bid referring to the DOT Regulations and the Fulco 1982 Program and attended the Pre-Bid Conference as early as May, 1982, it did not raise any objection to the DOT Regulations or the Fulco Program. Groves' original application in the District Court for a temporary restraining order, which was denied, and the initial complaint Groves filed in this case in August, 1982 did not raise any objection to the validity of Fulco's Program or the DOT Regulations. To the contrary, Groves initially sought a temporary restraining order and then sought damages against Fulco based on its claim that it had complied with the MBE Program and DOT Regulations. It was not until December, 1982, after the Airport Project was underway, that Groves for the first time sought damages against Fulco based on a challenge to the validity of the 1982 MBE Program and the DOT Regulations. Groves at no time sought an injunction against Fulco based upon a claim that Fulco's Program and the DOT Regulations were invalid.

Because Groves was challenging the constitutionality of the DOT Regulations, the District Court ordered the DOT and the Secretary of the DOT joined as "Federal Defendants" to defend the validity of the DOT Regulations. [Groves' Appendix at 34c-38c]. The District Court held the DOT Regulations were invalid. *S.J. Groves & Sons Co. v. Fulton County*, 696 F. Supp. 1480, 1495 (N.D. Ga. 1987). The District Court also held that Fulco's 1982 MBE Program, which was based upon and required by the DOT Regulations, violated the Georgia low-bid statute, O.C.G.A. § 36-10-2, Title VI of the Civil Rights Act of 1964, and the Equal Protection Clause of the Fourteenth

Amendment. [Groves' Appendix at 2d-6d]. The District Court found that reliance on a valid federal regulation would have provided a defense against Groves' claims, since a valid federal regulation would preempt the Georgia low-bid statute and the State Constitution and would be consistent with Title VI and the Fourteenth Amendment. [*Id.* at 2d]. The District Court held that because the DOT Regulations were invalid, reliance on the Regulations by Fulco did not provide it with a defense to Groves' claim for monetary damages for the alleged violation of the low-bid statute by adoption of the 1982 MBE Program. [*Id.* at 2d; 33c].

On appeal the Eleventh Circuit reversed the ruling of the District Court, holding that the DOT Regulations were authorized by Congress and the District Court applied the incorrect standard of strict scrutiny. *S.J. Groves & Sons Co. v. Fulton County*, 920 F.2d 752, 764-767 (11th Cir. 1991). This holding is the subject of Groves' Petition for Writ of Certiorari filed in this case on April 8, 1991, No. 90-1562.

The Eleventh Circuit also decided an important question of federal law that conflicts with applicable decisions of this Court and other courts of appeal. The Eleventh Circuit, despite finding that the DOT Regulations were authorized by Congress, held that Fulco as a local government recipient of federal funds under a federal grant may be liable in monetary damages to Groves solely based on its good faith reliance on and compliance with the presumptively valid DOT Regulations. The Eleventh Circuit held that this "good faith reliance defense" "is foreclosed by the recent Supreme Court decision in *American Trucking Ass'ns v. Smith*, ___ U.S. ___, 110 S.Ct. 2323, 110 L.Ed.2d 148 (1990)." *S.J. Groves*, 920 F.2d at 768. It is this far reaching decision which is the subject of Fulco's Cross-Petition.

EXISTENCE OF JURISDICTION BELOW

Jurisdiction in the District Court was based on 28 U.S.C. §§ 1331 and 1332(a). The Eleventh Circuit had appellate jurisdiction pursuant to 28 U.S.C. § 1291, providing for appeals from final decisions, and 28 U.S.C. § 1292(b), providing for interlocutory appeals.

REASONS FOR GRANTING THE WRIT

SUMMARY

Fulco, as a local government recipient of federal financial assistance pursuant to a federal grant from the United States under the AADA, should not be held liable in damages to a private party based solely on its good faith reliance upon and compliance with presumed to be valid federal regulations that are authorized by Congress, if those federal regulations are subsequently held invalid.

The decision of the Eleventh Circuit with respect to Fulco's good faith reliance defense is based on an erroneous application and interpretation of this Court's decision in *American Trucking Associations v. Smith*, 495 U.S. ___, 110 L.Ed.2d 148 (1990), and is in conflict with controlling decisions of this Court and other courts of appeal protecting the reasonable reliance of a party on prior law, even when such protection requires allowing a statute which is subsequently held invalid to remain in effect for a limited period of time. *E.g., Heckler v. Matthews*, 465 U.S. 728 (1984), and cases cited therein; *Lemon v. Kurtzman*, 411 U.S. 192 (1973); *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-107 (1971); *City of Phoenix v. Kolodziejski*, 399 U.S. 204 (1970); *Cipriano v. City of Houma*, 395 U.S. 701 (1969); *NLRB v. Rockaway News Supply Co.*, 345 U.S. 71 (1953); *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371 (1939); *Rosebud Sioux Tribe v. State of South Dakota*, 900 F.2d 1164 (8th Cir. 1990); *Kirschberg v. Feenstra*, 609 F.2d 727 (5th Cir. 1979).

The Eleventh Circuit's ruling on Fulco's good faith reliance defense is also in conflict with decisions of this Court and other courts of appeal recognizing a defense to a reverse discrimination challenge based on good faith compliance with presumed to be valid federal regulations in obtaining approval of an affirmative action plan by a federal agency. *See, e.g., United Jewish Organization v. Carey*, 430 U.S. 144 (1977); *Valentine v. Smith*, 654 F.2d 503, 509 (6th Cir. 1981), *cert. denied*, 102 S.Ct. 1972 (1982); *Southern Illinois Builders Association v. Ogilvie*, 471 F.2d 680 (7th Cir. 1972); *Contractors Association of Eastern Pennsylvania v. Secretary of Labor*, 442 F.2d 159, 175 (3rd Cir.), *cert. denied sub nom, Contractors Association v. Hodgson*, 404 U.S. 854 (1971).

The effect of the Eleventh Circuit's ruling has significant and far reaching ramifications. If Fulco is liable in damages based on its good faith compliance with congressionally authorized and presumptively valid federal regulations, then every local and state government that is considering entering into any grant agreement with the federal government and is required to comply with federal regulations would always be subject to the risk of liability in monetary damages for its mere compliance with the federal regulations. Moreover, such a ruling would mean that every governmental entity which complied with the DOT Regulations and entered into a grant agreement with the DOT, affecting hundreds of millions of dollars in contracts, would be at risk for monetary damages for complying with those Regulations.

If a local government as a recipient of federal funds under a federal grant can be liable in monetary damages to a private party for merely complying with federal regulations authorized by Congress that are subsequently held invalid, it would have a detrimental impact on the ability of Congress to use the Spending Power to further any broad national policy objectives by conditioning receipt of federal monies upon compliance by local or state gov-

ernments with federal statutory and administrative directives. Such a ruling in this case will jeopardize this technique to induce governments and private parties to cooperate voluntarily with federal policy. Worthwhile projects will go unfunded because local and state governments will be extremely reluctant to enter into federal grant agreements knowing that they could be subject to monetary damages if the terms and conditions are subsequently held invalid.

DISCUSSION

I. Fulco As A Recipient Of Federal Funds Under A Federal Grant Should Not Be Liable In Monetary Damages To A Private Party For Its Good Faith Compliance With Presumed To Be Valid Federal Regulations That Are Subsequently Held Invalid

Groves, a disappointed bidder, is not entitled to recover monetary damages from Fulco, a local government recipient pursuant to a federal grant agreement, for an alleged violation of the Georgia low-bid statute, based solely on Fulco's good faith compliance with presumed to be valid federal regulations authorized by Congress, when those regulations are subsequently held invalid. The Eleventh Circuit erred in holding that Fulco's good faith reliance defense was foreclosed by this Court's decision in *American Trucking*, 110 L.Ed.2d 148. The Eleventh Circuit's decision is in conflict with controlling decisions of this Court and other courts of appeal which establish that Fulco was entitled to rely on the DOT Regulations. The Eleventh Circuit's decision is also in conflict with decisions of this Court and other courts of appeal which recognize that a local government such as Fulco can rely on the fact that it complied in good faith with federal regulations in obtaining approval of an affirmative action plan by a federal agency in defense to a reverse discrimination challenge.

A. The DOT Regulations Are Presumptively Valid

Federal Statutes are presumptively valid unless it is shown that the statute in question bears no rational relationship to a legitimate purpose. *See, e.g., United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 174-176 (1980); *Vance v. Bradley*, 440 U.S. 93, 97 (1979); *United States v. Middleton*, 690 F.2d 820, 822 (11th Cir. 1982). Similarly, federal regulations enacted by federal administrative agencies pursuant to federal statutes, as well as the actions of federal administrative agencies, are presumptively valid until proven otherwise. *See, e.g., Pacific States Box & Basket Co. v. White*, 296 U.S. 176, 185-186 (1935); *Alabama Nursing Home Association v. Harris*, 617 F.2d 388, 393 (5th Cir. 1980); *Maryland-National Capital Park & Planning Commission v. Lynn*, 514 F.2d 829, 834 (D.C. Cir. 1975).

B. The DOT Regulations Should Remain In Effect To Protect Fulco, Even If Held Invalid, Because Of Fulco's Reasonable And Good Faith Reliance On Their Validity

1. Fulco's Reasonable And Good Faith Reliance Upon The DOT Regulations Should Be Protected

This Court has repeatedly recognized "in a number of contexts, *the legitimacy of protecting reasonable reliance on prior law even when that requires allowing an unconstitutional statute to remain in effect for a limited period to time.*" *Heckler*, 465 U.S. at 746 (emphasis added); *see Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87-89 (1982) (plurality opinion); *Buckley v. Valeo*, 424 U.S. 1, 142-143 (1976) (per curiam); *Chevron*, 404 U.S. at 106-107; *see also Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702, 718-723 (1978). The Court in *Heckler* held that the "protection of reasonable reliance interests" in a statute

later declared invalid is a "legitimate governmental objective." 465 U.S. at 746.

Applying this principle to the facts of this case, the following is undisputed: Fulco's good faith, reasonable reliance on the DOT Regulations; the presumption of validity attached to the DOT Regulations which the District Court and Eleventh Circuit held were authorized by Congress; and the particular relations and conduct of rights which became vested and were acted upon accordingly between Fulco and the United States in connection with the DOT Regulations and the Federal Grant.

It also is well-established by this Court that where a statute or regulation is held unconstitutional, its existence before it has been so declared is an operative fact which cannot justly be ignored. *E.g., Rockaway News Supply,* 345 U.S. at 77; *Chicot County,* 308 U.S. at 374; *see Kurtzman,* 411 U.S. at 198-199 (Statutory made rules of law are hard facts on which people must rely in making decisions and in shaping their conduct); *Kolodziejski,* 399 U.S. at 213-214; *Cipriano,* 395 U.S. at 706. The Eleventh Circuit's decision is in conflict with this well-established doctrine.

The principle well stated in *Chicot County* is applicable in this case:

> The courts below have proceeded on the theory that the Act of Congress, having been found to be unconstitutional, was not a law; that it was inoperative, conferring no rights and imposing no duties, and hence affording no basis for the challenged decree. [cit. omitted]. It is quite clear, however, that such broad statements as to the effect of a determination of unconstitutionality must be taken with qualifications. *The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored.* The past cannot always be erased by a new judicial

> declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects, — with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination.

308 U.S. at 374 (emphasis added); *see Rosebud Sioux Tribe*, 900 F.2d at 1172-1173 (applying *Chicot County*).

In *Rockaway News Supply*, the Court applied the principle as follows:

> There are two obstacles in the way of the Board's complete disregard of this contract. The first is that, even if inclusion of a forbidden provision is enough to justify the Board in setting it aside as to the future, *it does not follow that it can be wholly ignored in judging events that occurred before it was set aside.* It is one thing for the Board to say that the parties should not go on under such a contract; *it is another to say that no effect whatever may be given to a contract negotiated in good faith by the union and the employer which both believed to be valid and operative, to which both were conforming their conduct, and which no authority had yet held void.*
>
> Even where a statute is unconstitutional and hence declared void as of the beginning, this Court has held that its existence before it has been so declared is not to be ignored.

345 U.S. at 77 (emphasis added). This principle should be applied to protect Fulco's reasonable reliance on the DOT

Regulations, including allowing those Regulations to remain in effect for a limited period of time prior to any ruling declaring them invalid. Similar to the contract discussed in *Rockaway News Supply*, Fulco's contractual relationship with the DOT, the Federal Grant and the DOT Regulations are operative facts which cannot be ignored. The effect of Fulco's reliance should be considered with respect to the particular relations and conduct of the rights which have vested and been acted upon accordingly between the United States and Fulco.

This principle is especially pertinent to this case because of the far reaching ramifications to the doctrine of federalism and the legitimate broad policy objectives of the Spending Power of a decision holding a local or state government liable in monetary damages for its compliance in good faith with federal regulations subsequently held invalid. *See, e.g., South Dakota v. Dole*, 483 U.S. 203, 206-207 (1987) (Congress may further broad policy objectives by conditioning receipt of federal monies upon compliance by recipient with federal statutory and administrative objectives); *Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980).

The Court in *Kurtzman* recognized "one of the first principles of constitutional adjudication — the basic presumption of the constitutional validity of a duly enacted state or federal law", and held that the propriety of the relief afforded "must be measured against the totality of circumstances and in light of the general principle that, absent contrary direction, state officials and those with whom they deal are entitled to rely on a presumptively valid state statute, enacted in good faith, and by no means plainly unlawful." 411 U.S. at 208-209.

In *Kirschberg*, 609 F.2d 727, the former Fifth Circuit directly applied the principle. It held that a state law violated equal protection, but applied its ruling only prospectively because of the substantial inequitable re-

sults, injustice or hardship if it applied its decision *in that case* retroactively, *citing Chicot County* and other cases. *Id.* at 735-736.

2. *The DOT Regulations' Preemption Of The Georgia Low-Bid Statute Should Remain In Effect*

The District Court held and all parties agree that to the extent any state law conflicts with the federal regulations, it is preempted. Fulco's reliance on the federal regulations includes by definition reliance on the preemptive effect those regulations would have with regard to any conflicting state statute.

The DOT Regulations, which the Eleventh Circuit and District Court held were rooted in congressional authority, 920 F.2d at 764-765, and 696 F. Supp. at 1483-1484, even if they are subsequently determined to be invalid, still should preempt any conflicting state statute, at least until they are declared invalid. *See, e.g., Heckler,* and other cases cited *supra* at pp. 12-16. Because the Fulco MBE Program was adopted solely in compliance with presumed to be valid federal regulations, which were mandated pursuant to a valid congressional act and approved by appropriate federal authorities, it preempts any conflicting provisions of state law under the Supremacy Clause of the Constitution, Article VI, cl. 2. *See, e.g., Fidelity Federal Savings & Loan Association v. de la Cuesta,* 458 U.S. 141, 153 (1982); *Public Utilities Commission v. United States,* 355 U.S. 534, 544 (1958); *Contractors Association of Eastern Pennsylvania,* 442 F.2d at 166; *M.C. West, Inc. v. Lewis,* 522 F. Supp. 338, 349 n. 15 (M.D. Tenn. 1981).

"Legislative . . . regulations are 'issued by an agency pursuant to statutory authority . . . . Such rules have the force and effect of law.'" *Batterton v. Francis,* 432 U.S. 416, 425-26 & n. 9 (1977). 49 C.F.R. Part 23 is a substantive or legislative rule which had the force and effect of law since

it was issued pursuant to congressional authority, at least until it is held invalid. Fulco was entitled to rely in good faith on the regulations having the force and effect of law and the presumption of validity at the time it entered into the Grant Agreement. In addition, Fulco was entitled to rely on the preemptive effect of the regulations on state laws, including the Georgia competitive bid statute, when it entered into the Grant Agreement.

A determination that the regulations are invalid should only apply prospectively to a local government which in good faith relies upon the validity of the regulations and enters into a grant agreement. Otherwise, every local and state government which enters into any grant agreement with the federal government and is required to comply with federal regulations always would be at risk that subsequently it could be held liable in damages for its mere compliance with presumed to be valid federal regulations that are later held to be invalid. Moreover, if preemption does not apply during the time prior to the declaration of invalidity, then every governmental entity which complied with the DOT Regulations and entered into a grant agreement with the DOT, affecting hundreds of millions of dollars in contracts, potentially is at risk for complying with the Regulations since their inception.

3. *Holding Fulco Liable In Damages For Its Compliance With The DOT Regulations Would Be Inequitable*

Substantial unjust and inequitable results will accrue to Fulco, which justifiably and reasonably relied on the DOT Regulations, if a holding of invalidity is applied retroactively and the Regulations are denied any preemptive effect prior to the declaration of invalidity. *See, e.g., Chevron*, 404 U.S. at 107-109; *American Trucking*, 110 L.Ed.2d at 161-164, 168-171 (plurality opinion), and cases cited therein. Fulco faces liability in damages for

merely complying with the DOT Regulations. There also potentially will be substantial inequitable and unjust results for local and state governments throughout the United States who have complied in good faith with the DOT Regulations since their adoption *in 1981.*

The substantial injustice to Fulco is further demonstrated by the activities of Groves. The Fulco Airport Project bid materials contained references to the required compliance with 49 C.F.R. Part 23. Groves made no objection to such compliance. It was not until December, 1982, approximately four months after the original complaint was filed and after Fulco had awarded the contract to the second lowest bidder and construction was underway that Groves raised for the first time any of the constitutional and other challenges to the validity of the regulations and the Fulco MBE Program.

C. *Holding A Local Government Liable In Damages For Its Compliance With Federal Regulations Pursuant To A Grant Agreement Would Have A Detrimental Impact*

Pursuant to Article I, § 8, cl. 1 of the Constitution, Congress attaches conditions on the receipt of federal funds and employs the Spending Power to further national policy objectives. As well stated in *Fullilove,* 448 U.S. at 474:

> Congress has frequently employed the Spending Power to *further the broad policy objectives* by conditioning receipt of federal monies upon compliance by the recipient with federal statutory and administrative directives. This Court has repeatedly upheld against constitutional challenge the use of this technique to *induce* governments and private parties to cooperate voluntarily with federal policy. [cases omitted].

(emphasis added). *E.g., Dole*, 483 U.S. at 206-207; *Lau v. Nichols*, 414 U.S. 563 (1974); *Stewart Machine Co. v. Davis*, 301 U.S. 548 (1937).

If a local or state government can be liable in monetary damages for merely complying with federal regulations which are subsequently held invalid, there will be a detrimental impact on the ability of Congress to use the Spending Power to further broad national policy objectives by conditioning receipt of federal monies upon compliance by local or state governments with federal statutory and administrative directives. The Eleventh Circuit's ruling in this case jeopardizes this technique to induce governments and private parties to cooperate voluntarily with federal policy. Worthwhile projects will go unfunded because local and state governments will be reluctant to enter into federal grant agreements knowing that they could be subject to monetary damages if the terms and conditions are subsequently held invalid.

The ramifications of holding Fulco liable in this case would be to hold "those [Fulco] charged with executing state legislative directives to the peril of having their [Fulco] arrangements unraveled if they act before there has been an authoritative judicial determination that the governing legislation is constitutional." *Kurtzman*, 411 U.S. at 207. This would mean that local government officials would have to "stay their hands until newly enacted state [or federal] programs are 'ratified' by the federal courts, or risk the draconian, retrospective decrees should the legislation fall." *Id.* at 207-208.

In *Guardians Association v. Civil Service Commission of the City of New York*, 463 U.S. 582, 603 n. 24 (1983), this Court stated:

> [T]he Federal Government can always sue any recipient who fails to comply with the terms of the grant agreement and force the violator to repay misspent funds. . . . *But it is an entirely*

> *different matter to subject the recipient to open-ended liability to private plaintiffs. . . .* Congress may have felt that the salutary deterrent effect of a compensatory remedy was outweighed by the possibility that such a remedy would dissuade potential recipients from participating in important federal programs.

(emphasis added). The Court in *Guardians* refers to the analogous *"Pennhurst* presumption that only limited injunctive relief should be granted as a remedy for unintended violations of statutes passed pursuant to the spending power." *Id.* at 602 & n. 23. If a recipient cannot be liable in damages for violating a statute, surely it should not be liable for *complying* with the statute if it is later held invalid.

D. The Eleventh Circuit's Decision Conflicts With Decisions Of This Court And Other Federal Courts Permitting Good Faith Reliance In Defense To A Reverse Discrimination Challenge

A local government such as Fulco can rely on the fact that it complied in good faith with presumed to be valid federal regulations in obtaining approval of an affirmative action plan by a federal agency in defense to a reverse discrimination challenge. *See, e.g., United Jewish Organization,* 430 U.S. 144; *Milwaukee County Pavers Association v. Fiedler,* 710 F. Supp. 1532, 1545-1547 (W.D. Wis. 1989), *modified in part,* 731 F. Supp. 1395, 1409-1410 (1990), *aff'd,* 922 F.2d 419 (7th Cir. 1991); *Valentine,* 654 F.2d at 509, *cert. denied,* 102 S.Ct. 1972 (state university entitled to rely on findings by a federal agency of discrimination in adopting affirmative action plan in compliance with HEW); *Southern Illinois Builders Association,* 471 F.2d 680 (upheld Illinois' affirmative action plan where complying with federal statutes and directives in federally funded projects); *Eastern Pennsylvania,* 442 F.2d at 175, *cert. denied sub nom.,*

Contractors Association v. Hodgson, 404 U.S. 854 (1971); *see also Marvin v. Alston Independent School District*, 714 F.2d 1348, 1356 (5th Cir. 1983) (Plaintiff is not entitled to recover monetary damages against city school district when it attempts in good faith to adhere to federal guidelines, even if Court subsequently determines that it did not comply with necessary procedures); *Associated General Contractors of Massachusetts, Inc. v. Altshuler*, 490 F.2d 9 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974) (upheld Massachusetts' affirmative action plan adopted in compliance with Executive Order 11246 requiring contractors to accept federal agency approved affirmative action plan imposing bid conditions on contractors).

This Court recognized that Title VII establishes a complete immunity or "good faith" defense for employer conduct shown to have been undertaken in good faith, in conformity with, and in reliance on a written interpretation or opinion of the EEOC. *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 423 n. 17 (1975) (*See* 42 U.S.C. § 2000e-12(b), Title VII, § 713).[3] Similarly, Fulco is entitled to a defense for its good faith reliance on and compliance with written regulations promulgated by the DOT. The EEOC states it is "fundamentally unfair" to expose those subject to Executive Order to risks of liability under Title VII when they act in compliance with government requirements. 44 Fed. Reg. at 4425.

In addition, good faith compliance by an employer with an affirmative action plan required by federal regulations constitutes a defense to a reverse discrimination

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[3] The good faith reliance defense also has been codified under the Equal Credit Opportunity Act. 15 U.S.C. § 1691e(e). This statute provides an absolute defense against liability for "any act done or omitted in good faith in conformity with any official rule, regulation . . . , notwithstanding that after such act or omission has occurred, such rule, regulation . . . is . . . determined by judicial or other authority to be invalid . . . ."

challenge. *See, e.g., Setser v. Novack Investment Co.*, 657 F.2d 962, 968 (8th Cir. 1981); *Sisco v. J.S. Alberici Construction Co.*, 655 F.2d 146 (8th Cir. 1981).

In *United Jewish Organizations ("UJO")*, this Court concluded that the use of racial criteria by the State of New York, in attempting to comply with the Voting Rights Act and to secure the approval of the Attorney General, did not violate the Fourteenth Amendment. The Court affirmed the judgment of the court of appeals that New York's plan was not subject to challenge because it was done in compliance with the Voting Rights Act and with the approval of the Attorney General. 430 U.S. at 164-165.

In *Eastern Pennsylvania*, the Court held that Executive Order 11246, the federal agency interpretation of the Order and implementation of an affirmative action plan, as a precondition to federally assisted construction projects in Pennsylvania, was valid as being within the implied authority of the President and the Department of Labor. 442 F.2d at 171, 174. The affirmative action plan was approved by the Attorney General. *Id.* Although in *Eastern Pennsylvania*, the President by Executive Order acted without a congressional mandate as in the present case, the Court upheld the federal imposition of the affirmative action requirement on federally assisted construction contracts. 442 F.2d at 171, 174-175.

Moreover, the only reported case that considered the validity of 49 C.F.R. Part 23 as that regulation existed at the time of the approval of the Fulco MBE Program in April, 1982 was *M.C. West*, 522 F. Supp. at 338. In *M.C. West*, the Court expressly upheld the validity of 49 C.F.R. Part 23 against similar constitutional and state law challenges.[4]

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[4] In *Central Alabama Paving, Inc. v. James*, 449 F. Supp. 629 (M.D. Ala. 1980), the Court held invalid the DOT's MBE Regulation prior to its

Significantly, the United States Department of Justice, similar to the Attorney General in *Eastern Pennsylvania* and *UJO*, actively supported and defended the validity of 49 C.F.R. Part 23 as a participant in *M.C. West*. In fact, the Attorney General specifically approved and concurred in 49 C.F.R. Part 23 on July 17, 1981. [Fulco's Appendix at 1b]. Fulco, similar to the non-federal governments in *UJO* and *Eastern Pennsylvania*, was entitled to rely on the opinion of the Attorney General of the United States supporting and affirming the validity of 49 C.F.R. Part 23 when it entered into the Grant Agreement with the U.S. DOT in September, 1982.

Therefore, Fulco should not be held liable in monetary damages for its good faith compliance with presumed to be valid DOT Regulations, especially where the Regulations were rooted in congressional authority, and were declared valid by the Attorney General, the Department of Justice, and the only federal court to have considered their validity as they existed at the time Fulco entered into the Grant Agreement with the DOT.

E. The "Choice" Of Foregoing Federal Funds Is Not Relevant

The Eleventh Circuit remarked that "we have trouble allowing a local government to plead reliance on federal regulations when the local government *voluntarily* relied on those regulations." *S.J. Groves*, 920 F.2d at 767. The evidence shows that Fulco had no other alternative but to obtain federal funds to accomplish the Airport Project based on the circumstances which existed at that time and therefore to comply with the federal regulations. Fulco pursuant to state and local laws is restricted

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amendment in 1981 to eliminate the conclusive presumption that contractors who failed to comply with the MBE goals are ineligible for consideration. *Id.* at 632.

and limited in the way it can raise and spend funds, and the time it takes to do so.

The determination to forego federal grants does not in reality provide much of a free "choice" to local and state governments who need to fund worthwhile projects. This Court in *Fullilove*, 448 U.S. 448, and *Dole*, 483 U.S. 203, did not consider relevant the fact the states enjoyed the "option" or "choice" of foregoing federal funds. *See Milwaukee County Pavers Association v. Fiedler*, 710 F. Supp. 1532, 1546 (W.D. Wis. 1989), *aff'd*, 922 F.2d 419 (7th Cir. 1990).

II. American Trucking Does Not Hold That A Local Government Could Be Liable In Monetary Damages For Good Faith Reliance Upon Federal Regulations

The Eleventh Circuit incorrectly held that *American Trucking*, 110 L.Ed.2d 148, "foreclosed" Fulco's good faith reliance defense. The specific issue in *American Trucking* was whether the constitutional decision in *American Trucking Associations v. Scheiner*, 483 U.S. 266 (1987), in which the Court held that a state tax law violated the Commerce Clause, should be applied retroactively to the parties before the Court.

The Eleventh Circuit based its holding on the four dissenters' opinion and Justice Scalia's concurring opinion. The Eleventh Circuit in effect created a purported "majority" of the Court in adoption of what amounts to "anticipatory *stare decisis*". *See* 1B J. Moore, J. Lucas & T. Currier, *Moore's Federal Practice* ¶ 0.402[2] (2d ed. 1991).

Federal courts of appeal have a duty to follow the *majority opinions* of this Court. *E.g., United States v. Vida*, 370 F.2d 759, 766 (6th Cir. 1966); *Ferina v. United States*, 340 F.2d 837-839 (8th Cir. 1965). In *American Trucking*, there was no *majority opinion*. The Eleventh Circuit gave undue controlling precedential weight to the dissenting opinion. Federal courts of appeal, as inferior courts, cannot follow the dissenting opinions of the

Supreme Court. *E.g., Marino v. Bowers*, 657 F.2d 1363, 1368 (3rd Cir. 1981) ("Were we to require individuals to be guided in their actions by dissenting opinions we would stand the system of *stare decisis* on its head"); *United States v. Barbera*, 514 F.2d 294, 300 (2nd Cir. 1975); *United States v. Harpole*, 263 F.2d 71, 80 (5th Cir. 1959).[5]

The fact that there was no clear majority opinion in *American Trucking* entitled to *stare decisis* treatment is demonstrated by the recent decisions of this Court in *Ashland Oil, Inc. v. Caryl*, 111 L.Ed.2d 734 (1990); and *National Mines Corp. v. Caryl*, 111 L.Ed.2d 740 (1990). In these two recent decisions, this Court recognized its division on the issue of retroactive application of its constitutional decisions by analyzing the issue under both the plurality and dissenting views in *American Trucking*. This Court did not find either the plurality or dissenting view controlling.

The Eleventh Circuit's interpretation of the *American Trucking* dissent and Justice Scalia's concurrence appears to apply the old void *ab initio* principle. The Eleventh Circuit concluded those five Justices in *American Trucking* would hold that if the DOT Regulations are unconstitutional, they are void from the beginning and void when Fulco relied on them. The void *ab initio* principle, once applied by this Court in *Norton v. Shelby County*, 118 U.S. 425 (1886), however, has been rejected and abandoned by this Court. As well stated by this Court in *Lemon v. Kurtzman:*

> Consequently, our holdings in recent years have emphasized that the effect of a given constitutional ruling on prior conduct "is subject to no set 'principle of absolute retroactive invalidity'

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[5] Likewise, a judgment or affirmance of the Supreme Court rendered by an equally divided Court is without force as precedent. *E.g., Ohio v. Price*, 364 U.S. 263, 264 (1960); *Neil v. Biggers*, 409 U.S. 188, 192 (1972).

> but depends upon a consideration of 'particular relations . . . and particular conduct . . . of rights claimed to have become vested, of status, of prior determinations deemed to have finality'; and 'of public policy in the light of the nature both of the statute and of its previous application.' " *Linkletter supra* at 627, 14 L.Ed.2d 601, quoting from *Chicot County Drainage Dist., supra*, at 374, 84 L.Ed.2d 329. However appealing the logic of *Norton* may have been in the abstract, its abandonment reflected our recognition that *statutory or even judge-made rules of law are hard facts on which people must rely in making decisions and in shaping their conduct. This fact of legal life underpins our modern decisions recognizing a doctrine of nonretroactivity.*

411 U.S. at 198-199 (emphasis added). The DOT Regulations were the "hard facts" on which Fulco relied in entering into the Grant.

The Eleventh Circuit states: "We are without power to declare them [DOT Regulations] constitutional 'in the interim'. . . . There is simply no authority on which to do this." *S.J. Groves*, 920 F.2d at 768. In making this statement, the Eleventh Circuit did not consider the decisions in which this Court recognized the legitimacy of protecting good faith and reasonable reliance on prior law, "even when that requires allowing an unconstitutional statute to remain in effect for a limited period of time". *See, e.g., Heckler*, 465 U.S. at 746, and cases cited therein and *supra* at pp. 12-16.

The Eleventh Circuit's creation of a purported "majority" from the four dissents and one concurrence in *American Trucking* violates the rule of this Court that "when no single rationale commands a majority of the members of the United States Supreme Court, the hold-

ing of the Court may be viewed as that position taken by those members who concurred in the judgment on the narrowest grounds." *E.g., Marks v. United States*, 430 U.S. 188, 193 (1977); *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 464-465 n. 9 (1988). Justice Scalia concurred in the judgment of the plurality in *American Trucking*, which held that the *Scheiner* decision did not apply retroactively based on the retroactivity doctrine enunciated in *Chevron*. The narrowest ground for the non-retroactivity holding in *American Trucking* may be viewed as that position taken from the plurality and concurrence. The position of the dissent should not be viewed as the holding of the Court, which can then be used as *controlling* precedent to "foreclose" Fulco's good faith reliance defense.

Moreover, the *American Trucking* dissent makes a distinction between "remedy" cases (i.e., cases concerning the relief that a federal court should award when applying a new law), which the *Chevron* line of cases fall, and "choice of law" cases (i.e., cases concerning the application of a new constitutional or statutory rule), which *American Trucking* is an example. Fulco's good faith reliance defense involves a "remedy" case concerning the relief that a federal court should award. The *American Trucking* dissent recognizes that consideration of reliance can be appropriate in the "remedy" cases. 110 L.Ed.2d at 189. The Eleventh Circuit did not address this distinction.

Furthermore, the dissent in *American Trucking* is distinguishable from the present case and not controlling. First, *American Trucking* involved the issue of whether this Court's decision declaring a *state* tax law unconstitutional should be applied retroactively to the parties in another case. This case involves the issue of whether a local government may be held liable in damages for its mere good faith reliance on federal regulations. It does not deal with the issue of whether a constitutional decision of this Court should be applied retroactively. Second,

in *American Trucking*, the State of Arkansas enacted the invalid tax statute and collected the taxes which were later determined to be invalid. Retroactive application of *Scheiner* would result in Arkansas being liable to the taxpayers for refunds of the wrongfully collected taxes.

In the present case, the equitable considerations are much greater. Fulco played no part in enacting the federal regulations. Retroactive application of a ruling holding the regulations invalid would result in Fulco being liable out of its own funds as damages based on its mere compliance with presumptively valid federal regulations, which it was contractually obligated to follow pursuant to a federal grant agreement.

The Eleventh Circuit's statement that it would have "difficulty simply declaring the regulations unconstitutional, and then not applying that declaration even to the parties before the court" because it would approach an "advisory opinion" is in error. This Court has repeatedly announced new rules for the future only, refusing to apply them even to the parties before the Court. *American Trucking*, 110 L.Ed.2d at 187 n. 11, and cases cited therein; *Allen v. Board of Elections*, 393 U.S. 544 (1969); *Linkletter v. Walker*, 381 U.S. 618, 621-622 (1965); *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964).

In *England*, this Court held that its opinion resolved an ambiguity in prior law and therefore it would be unfair to apply the new rule to the parties in that case. "On the record in the instant case, the rule we announce today would call for affirmance of the District Court's judgment. But we are unwilling to apply the rule against these appellants." 375 U.S. at 422-423.

In *Allen*, this Court applied "purely prospectively" to the parties its determination that certain amendments to Mississippi's elections laws violated the Section 5 preclearance procedures of the 1965 Voting Rights Act be-

cause "[t]hese Section 5 coverage questions involve complex issues of first impression — issues subject to rational disagreement." 393 U.S. at 571-572. *See also Great Northern Railway Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932).

CONCLUSION

For all the foregoing reasons, Cross-Petitioner Fulton County, Georgia respectfully requests that the Court grant its Cross-Petition for a Writ of Certiorari.

DATED: May 8, 1991
Atlanta, Georgia

Respectfully submitted,

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